

MICHAEL ROITMAN, Esq.

July 13, 2012

Donna Levin, Esq.
General Counsel
Department of Public Health
250 Washington Street
Boston, MA 02108-4619

Linda L. Han, MD, MPH
Director
Bureau of Laboratory Sciences
William A. Hinton State Laboratory Institute
305 South Street
Jamaica Plain, MA 02130

Re: Commonwealth v. [REDACTED]

Dear General Counsel Levin and Director Han:

I represent [REDACTED] in a Suffolk Superior Court case where he is charged with Distribution of Class B and Class D Substances. The materials were analyzed at the William A. Hinton State Laboratory Institute in Jamaica Plain.

Enclosed please find a copy of Defendant [REDACTED] Motion for the Issuance of a Summons for Records of the Department of Public Health.

My motion is currently scheduled for a hearing on August 13, 2012 in Suffolk Superior Court. ADA Christine Walsh, Esq. represents the Commonwealth in this case.

I am sending you this motion so that the Department of Public Health may consider its position concerning the motion for issuance of a summons for the requested records.

Thank you for your courtesy and attention to this matter.

Very truly yours,

Michael Roitman

C: ADA Christine Walsh, Esq.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
DOCKET NO. [REDACTED]

COMMONWEALTH

v.

[REDACTED]

**DEFENDANT'S MOTION FOR ISSUANCE OF A SUMMONS
FOR RECORDS OF THE MASSACHUSETTS
DEPARTMENT OF PUBLIC HEALTH**

I. Introduction

The defendant, Domingos Cabral, moves this Court pursuant to *Massachusetts Rule of Criminal Procedure Rule 17(a)(2)*, to authorize the Clerk to issue a summons to the Massachusetts Department of Public Health, William A. Hinton, State Laboratory Institute, 305 South Street, Jamaica Plain, MA 02130 for the production of the following materials and documents:

1. A copy of the "Control Card" for the analysis of the alleged cocaine and marijuana in this case.
2. A print out of the electronic data showing the chain of custody for the alleged controlled substances in this case.
3. A print out of the "Auto-Tune" sheet showing the tuning and calibration of the GC/MS Equipment used to in the confirmatory testing of the cocaine in this case.
4. Any Quality Control Audits for the Analysts/Chemists who analyzed the alleged controlled substances in this case.

5. The latest version of the Laboratory Protocol for the William Hinton Laboratory, where the alleged controlled substances were analyzed.
6. A copy of the Operating Manual for the GC/MS Equipment used in the confirmatory testing of the alleged cocaine in this case.

The records should be produced to the Office of the Criminal Clerk, Suffolk Superior Court, Suffolk County Courthouse, Room 1402, Three Pemberton Square, Boston, MA 02108.

II. The Court Should Allow a Summons to be Issued for the Materials

The Commonwealth charged Domingos Cabral Distribution of a Class B and a Class D Substance within a School Zone.

The defendant filed a Motion for Discovery of Materials Related to the Analysis of Alleged Controlled Substances. On June 6, 2012, Judge Ball allowed the motion in part, denied the motion as to request number 10 and ordered that "as to materials as to which the Commonwealth has no access, a Rule 17 Motion needs to be served on the Hinton Laboratory at Jamaica Plain."

The defendant now submits a motion for the issuance of a Rule 17 Summons on the Department of Public Health, William A. Hinton Laboratory for the requested materials. The request concerns materials showing the chain of custody of the substances allegedly distributed by the defendant and then analyzed by the Analysts/Chemists at the William Hinton Laboratory, the calibration of the GC/MS Equipment used to in the confirmatory testing of the cocaine in this case, the latest version of the Laboratory Protocol which specifies

the practices and procedures of the laboratory and the Operating Manual for the equipment used in analyzing the alleged substances.

The defendant also seeks the Quality Control Audits for the Analysts/Chemists who analyzed the allegedly controlled substances in this case. Supervisors at the laboratory conduct random Quality Control Audits of the Analysts/Chemists who work at the laboratory. Approximately once per month, a supervisor randomly audits the work of five or six Analysts/Chemists at the laboratory. The audit includes a review of the analyst's laboratory notes and a re-test of the sample. The results of each audit are recorded and maintained as pages in a three ring notebook.

All of the requested materials are relevant to the Commonwealth's proof that the materials allegedly distributed by the defendant are actually illegal Class B and Class D substances. The materials are all in the custody and control of the Commonwealth of Massachusetts, Department of Public Health.¹ The materials will assist the defense in the cross-examination of the Commonwealth's expert Analysts/Chemists.

A copy of the Affidavit of Michael Roitman, Esq. in Support of Defendant Domingos Cabral's Motion for Discovery of Materials Related to the Analysis of Alleged Controlled Substances, which was filed with the Court on April 13, 2012, is attached to this motion.

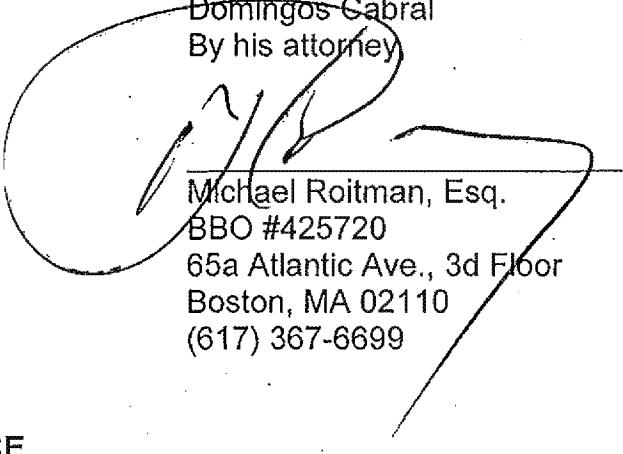
¹ The defendant does not waive the argument, presented in his Motion for Discovery of Materials Related to the Analysis of Alleged Controlled Substances, that the requested materials should have been produced by the Commonwealth as mandatory discovery pursuant to M.R.Crim.P. Rule 14(a)(1)(A)(vii).

III. Conclusion

The defendant [REDACTED] respectfully requests that the Court allow his motion for issuance of a summons for records of the Massachusetts Department of Public Health, William A. Hinton Laboratory.

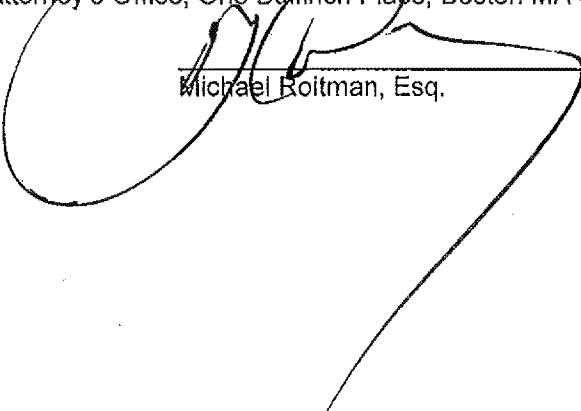
Dated: July 13, 2012

Domingos Cabral
By his attorney


Michael Roitman, Esq.
BBO #425720
65a Atlantic Ave., 3d Floor
Boston, MA 02110
(617) 367-6699

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the above Motion and Affidavit by e-mail on July 12, 2012 and by hand on July 13, 2012 to: ADA Christine Walsh, Esq. of the Suffolk County District Attorney's Office, One Bulfinch Place, Boston MA 02114-2997


Michael Roitman, Esq.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT
DOCKET NO. [REDACTED]

COMMONWEALTH

v.

[REDACTED]
**AFFIDAVIT OF MICHAEL ROITMAN, ESQ IN SUPPORT OF
DEFENDANT [REDACTED]**
**MOTION FOR DISCOVERY OF MATERIALS RELATED TO THE
ANALYSIS OF ALLEGED CONTROLLED SUBSTANCES**

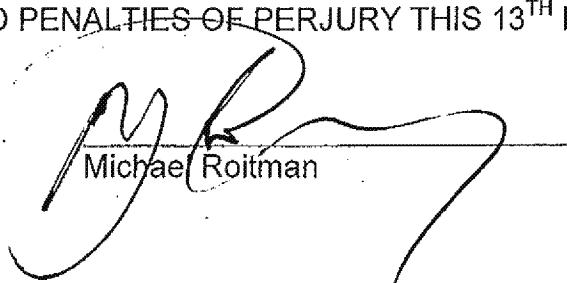
I, Michael Roitman, state as follows:

1. I am court-appointed counsel for the defendant [REDACTED]
2. On April 9, 2012, I went to the William A. Hinton, State Laboratory Institute, 305 South Street, Jamaica Plain, MA 02130 where the alleged controlled substances in this case were analyzed.
3. Together with Emily Karstetter, Esq. and ADA Katherine Powell, Esq., I met with Charles Salemmi and Peter Piro who are supervisory employees working at the laboratory.
4. Charles Salemmi and Peter Piro explained some of the policies, procedures and practices of the laboratory. Mr. Salemmi and Mr. Piro provided the following information:
 - a. Personnel at the laboratory assign a Control Number to all samples submitted to the laboratory for analysis. A Control Card with the number and bar code information stays with each sample. The Control Number and Control Card should be unique to the sample.
 - b. The laboratory maintains electronic data shows the chain of custody of each sample including the name of the analyst and the date on which the analyst took control of the sample and when the analyst returned the sample

- c. Analysts weigh and perform preliminary or screening tests on some samples.
- d. For cocaine and heroin, laboratory personnel perform confirmatory testing using a Gas Chromatograph/Mass Spectrometer (GC/MS). The laboratory maintains Operating Manuals for the GC/MS equipment.
- e. The GC/MS equipment is tuned or calibrated every day prior to use. The GC/MS equipment prints a page showing the Auto Tune of the equipment.
- f. Charles Salemmi conducts random Quality Control Audits of the analysts/chemists who work at the laboratory. Approximately once per month, Mr. Salemmi audits the analysis of samples performed by approximately five or six analysts/chemists. The audit includes a review of the analyst's laboratory notes and a re-test of the sample. The results of each audit are recorded and maintained as pages in a three ring notebook.
- g. The laboratory has a set of Policies and Procedures which was last updated in September 29, 2004.

5. On information and belief, on February 1 and February 21, 2012, Linda Han, the Director of the Bureau of Laboratory Sciences of the Massachusetts Department of Public Health notified the Norfolk District Attorney about a "possible breach of protocol" at the laboratory. On information and belief, Anne Dookhan is the analyst/chemist who was the investigated concerning the breach of protocol. On information and belief, Ms. Dookhan no longer works at the laboratory. Copies of the two letters from Director Han are attached hereto.

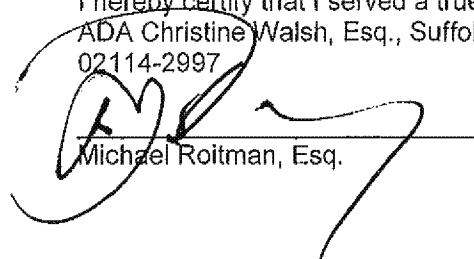
SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY THIS 13TH DAY OF APRIL 2012.



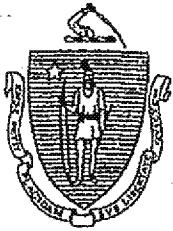
Michael Roitman

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the above motion by hand on April 13, 2012 to
ADA Christine Walsh, Esq., Suffolk County District Attorney's Office, One Bulfinch Place, Boston MA
02114-2997



Michael Roitman, Esq.



The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Department of Public Health
250 Washington Street, Boston, MA 02108-4619

DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LIEUTENANT GOVERNOR

JUDYANN BIGBY, MD
SECRETARY

JOHN AUERBAUGH
COMMISSIONER

February 1, 2012

Michael W. Morrissey, Norfolk District Attorney
Norfolk District Attorney's Office
45 Shawmut Road
Canton, MA, 02021

Dear District Attorney Morrissey,

I am writing to inform you that we are currently investigating a possible breach of protocol with respect to ninety drug samples tested at the William A. Hinton State Laboratory Institute. These ninety samples were received exclusively from Norfolk County and assigned for analysis on the same day. Attached is a list of the control numbers for the samples identified in the investigation.

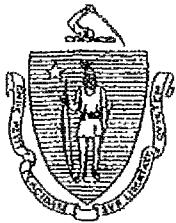
At this time, there is no evidence that this had an impact on the integrity of the samples or the accuracy of the sample analysis. Please be assured that measures were immediately taken to ensure proper compliance with protocol procedures.

Additional information will be provided upon completion of the investigation.

Sincerely,

A handwritten signature in black ink, appearing to read "Linda Han".

Linda Han, MD, MPH, Director
Bureau of Laboratory Sciences



The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Department of Public Health
250 Washington Street, Boston, MA 02108-4619

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JOHN AUERBACH
COMMISSIONER

February 21, 2012

Michael W. Morrissey, Norfolk District Attorney
Norfolk District Attorney's Office
45 Shawmut Road
Canton, MA 02021

Dear District Attorney Morrissey,

As I indicated in my letter to you dated February 1, 2012, I am providing additional information based on the investigation concerning a breach of protocol at the William A. Hinton State Laboratory Institute ("the Lab"). Further detail is provided below:

The Lab's protocols for handling evidence samples require that all samples received for testing be given a unique sample identifier called an evidence control number. The Lab uses the control number to track the samples as they undergo the testing process. The control numbers are initially entered into a computer tracking system and log book when first received by the Lab, and a card (control card) containing the control number is attached to the sample. When the samples are transferred out of the evidence office for testing, they are manually recorded in the office log book (log book) and computer tracking system. An evidence officer is required to record his/her initials, the date of the transfer and the initials of the chemist accepting receipt of the sample(s) in the log book. The chemist receiving the sample is required in the presence of the evidence officer to record his/her initials signifying his/her receipt. The chemist also initials the control card after completing the testing process.

These protocols have been consistently followed with regard to the drug samples, ensuring that the integrity of the samples is protected and providing drug analytical results that are expertly prepared and accurate.

Because of the mechanisms in place to identify problems, Laboratory personnel quickly became aware of a potential breach in its recording protocols on June 16, 2011 when an evidence officer noted that the information displayed on the computer for a case did not show the sample(s) for that case as having been assigned to the chemist identified on the control card. This process was repeated for other samples in the same batch with the same results. Further investigation revealed no entries in the log book recording a transfer of these samples from the evidence office to the chemist for testing on June 14, 2011.

The evidence officer immediately contacted her supervisor to alert her of the irregularity. The supervisor, in turn, on June 20th brought this to the attention of her supervisor, the Laboratory's Director of the Division of Analytic Chemistry and, in addition, to my attention and the attention of the Supervising Chemist for the Analysis Section. On the same day, June 20th, they all examined the log book and confirmed that there had been no recording of a transfer of these samples from the evidence office to the chemist for testing on June 14th. On June 21st, when the log book was reexamined, entries did appear showing a transfer of the samples from the evidence office to the chemist. It appeared that these entries were made by the chemist after June 14th.

The chemist involved in this case has been employed by the Department for eight years. Prior to this incident, she had no personnel issues and was well respected for the accuracy of her work and her dedication to the Laboratory's mission. In review of the incident, the managers at the Laboratory did not believe there was any reason to believe that the integrity of the samples had been affected by the breach in protocol or the late entries in the log book. However, the chemist was removed from all responsibilities involving laboratory analysis as of June 21, 2011.

The Commissioner's office first became aware of this incident on December 1. The Laboratory managers had not reported this incident to the DPH Central Office because they did not appreciate its potential legal significance and because of their opinion that the integrity of the test results had not been affected. The Central Office conducted its own investigation of the incident and confirmed that there was no evidence to suggest that the integrity of the results was impacted

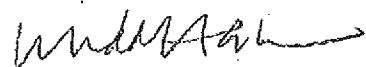
by the documentation issue with the log book. The Department's Human Resources Division is reviewing what appropriate disciplinary actions should be taken.

Within the single batch that shared this documentation breach, there were a total of 90 evidence samples, all of which were from Norfolk County.

The Department has taken a number of steps to minimize any reoccurrence of this nature. The Laboratory revised and strengthened its protocols for handling test samples. The new protocols include more secure, redundant mechanisms for tracking and transferring samples, and limit direct access to the samples to the evidence officers.

Please let me know if you have any questions concerning this additional information.

Sincerely,



Linda Han, MD, MPH, Director
Bureau of Laboratory Sciences